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July 18, 2014

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
United States Department of the Interior
1849 C Street, NW
MS 4141
Washington, D.C. 20240

Re: Revision of Regulations on Federal Acknowledgment of American Indian Tribes, 25 C.F.R. Part 83
Docket ID: BIA-2013-0007
Comments of the Confederated Tribes of Siletz Indians of Oregon ("Siletz Tribe")

To Whom It May Concern:

I am the tribal attorney for the Siletz Tribe. I submit the following comments on behalf of the Tribe, on the BIA's proposed revision of the Federal Acknowledgment Regulations at 25 C.F.R. Part 83. I submitted comments previously on behalf of the Siletz Tribe on the Department's proposed regulations on September 19, 2013. I attach a copy of those comments to this letter, and incorporate those comments by reference because the Bureau of Indian Affairs ("BIA") has not responded to any of the concerns of the Siletz Tribe raised in those comments, in the proposed final rule published in the Federal Register, Volume 79, page 30766, on May 29, 2014. Comments below will reference this Federal Register publication. The Siletz Tribe's concerns remain, and in fact are increased by the comments and language included in the BIA's proposed final rule.

General Concerns:

The Siletz Tribe laid out its general concerns in its original comment letter, and the Tribe incorporates those comments by reference here. Just in the short time since the Department's proposed final regulations have come out, at least 8 splinter groups claiming to be one of the tribes or bands of Indians that comprise the Confederated Tribes of Siletz Indians of Oregon have announced their intent to petition for federal recognition. Despite the fact that cases and administrative actions have confirmed that the Siletz Tribe is the successor in interest to a particular band or tribe of Indians, the proposed regulations will allow a splinter group that need only show that it has been

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internally cohesive as social/political entity since 1934 to claim the history of the Siletz Tribe, and even to claim successorship that belongs to the Siletz Tribe. It remains the position of the Siletz Tribe that in the event the Department proceeds with these regulations, a new section must be added addressing the situation where a petitioning group claims to be a historical tribe that is already recognized by the federal government, either as a stand-alone tribe or as part of a tribal confederation. Recognition of a group in this situation should not be permitted until and unless the Department resolves the question, after a full trial in which all affected parties are represented, of whether a petitioning group can claim any successorship to a historical tribe where the federal government already has a relationship with that historical tribe through a currently recognized Indian tribe.

The Siletz Tribe disagrees with the Department's stance and "experience" that allows it to conclude that meeting the regulatory acknowledgment criteria in 1934 means that the entity has proven that it has continuously existed as an Indian tribe since first European contact in the 1800s, or earlier. The Siletz Tribe understands that there was not a large amount of interaction between the federal government and many Indian tribes between the Allotment Act in 1887 and the Indian Reorganization Act in 1934, and that entities petitioning for federal acknowledgment should not be required to show such interaction as a condition for achieving federal recognition.

Nevertheless, an entity must still provide evidence that it – as a separate entity - has existed continuously since first European contact up to 1934. This is particularly true when the entity claims to be a tribe or band that either already exists separately as a tribe, or which is part of a currently recognized tribe that is a confederation of tribes and bands of Indians. Otherwise, a petitioning entity can claim the history of a currently recognized tribe without having to make any showing that it – the petitioning entity – has any factual or legal relationship with that history. Merely by calling itself the same name as the historical entity, the regulations allow it to improperly claim another tribe's history.

I am going to use the example of a neighboring tribe to the Siletz Tribe – the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Tribes ("Coos Tribe") as an example of the problems the current draft of the regulations will cause. While the Coos Tribe was recognized in 1984 through federal legislation rather than through the administrative federal acknowledgment process, the facts regarding the Coos Tribe are still relevant to the issues the Siletz Tribe raises in these comments.

The Coos, Lower Umpqua and Siuslaw Tribes were three of the 23 tribes and bands of Indians that signed the "Coast" Treaty in 1855. The treaty formally "confederated" all of the signatory bands and tribes. While that treaty was never ratified by the United States, the federal government implemented the treaty and moved all of the signatory bands and tribes to the newly established (by Executive Order) Siletz Coast Reservation. These three tribes and several others were settled on the southern end of the Siletz Coast Reservation. In 1875, Congress passed a statute eliminating the southern portion of the Siletz Coast Reservation, and consolidating all the Indians on the

Reservation in the remaining 225, 000 acre reservation, now known as just the Siletz Reservation. The statute provided that the Indians would not be moved to the consolidated reservation, and the Act carried out, without their consent. While history shows that none of the many tribes and bands residing on the pre-1875 Siletz Coast Reservation gave their consent to removal and consolidation, the federal agent reported that the necessary consent had been given, and opened up the described portions to non-Indian settlement. *See* 1 Kapplers 157 n. *a.* The tribes, including the Coos Tribe, the Lower Umpqua Tribe, and the Siuslaw Tribe among others were removed to the remaining Siletz Reservation. The modern day Siletz Tribe has over 1000 members of descent from these three tribes.

Not all the Indians from these three tribes ended up on the Siletz Coast Reservation. Some Coos and Lower Umpqua Indians (the Siletz Coast Reservation included most of the Siuslaw homeland, so they did not have to move) eluded federal officers and remained in their aboriginal areas. Others left the Siletz Coast Reservation after being moved there, and returned to the Coos Bay area in southern Oregon. Documentation shows that some of this small group of individuals formed a "community" somewhere around 1918, mostly in conjunction with a pending claims case, but the community did eventually form a cohesive entity. The federal government took a number of actions in the 1930s and 1940s along the Oregon Coast to benefit Coos, Lower Umpqua, Siuslaw and other Indians, but there is no evidence that the BIA intended in any particular instance to benefit the community around Coos Bay as opposed to the Coos Tribe that was part of the confederated Siletz Tribe.

The 1984 Coos Recognition Act and its legislative history make clear that the entity being recognized was the Coos community in and around Coos Bay, Oregon. No mention of successorship to the historical Coos, Lower Umpqua and Siuslaw Indians or claims to the Siletz Coast Reservation because of the Tribes' residence on that reservation appear. Nevertheless, recently the recognized Coos Tribe has begun claiming sole successorship to the historical Coos, Lower Umpqua and Siuslaw Tribes, based on its federal recognition. The Coos Tribe claims that those three tribes never merged with or became part of the Siletz confederation. So now the Siletz Tribe is engaged in a protracted and expensive legal battle to defend its successorship to the three historical tribes. It is undisputed that the community of Coos Indians in Coos Bay did not form until 1918, but under the proposed federal acknowledgment regulations, which only require proof of existence in 1934, this formation would result in a conclusion that the entity had existed as a distinct Indian tribe since the date of first European contact with the Coos, Lower Umpqua and Siuslaw Tribes. Such a finding would be demonstrably false as a matter of history.

The same experience will result if the proposed Federal Acknowledgment regulations are passed as proposed. There are already a number of petitioning entities who claim that they are comprised of Indians who never moved to the Siletz Coast Reservation, and that there was an "incomplete" confederation of their associated "tribe" into the Siletz Tribe. If these assertions cannot be resolved as part of any federal

acknowledgment petition, the Siletz Tribe will sentenced to endless protracted litigation to defend its legal status as the successor to all of the tribes and bands that were settled on the Siletz Coast Reservation and confederated into the Siletz Tribe. This confederation has long been accepted by the Department of Interior and is confirmed in a number of court decisions.

The Siletz Tribe is not complaining about petitioning entities such as the Samish Tribe that proved in long and protracted litigation that it has existed continuously as the historical Samish Tribe from treaty time in 1855 to the present, and that the Samish Tribe had not merged with or assimilated into any other federally recognized tribe. But only having to prove you existed from 1934 to the present is a significant and improper weakening of the current federal acknowledgment regulations. The Department of Interior has consistently taken place that modifications to the original 1978 federal acknowledgment regulations has not altered the substantive test for federal acknowledgment – the entity must prove that it has continuously existed as a separate and distinct Indian tribe from the date of first sustained European contact to the present – but the current proposed regulatory revision essentially eliminates that requirement by weakening the process and the proof substantially.

The proposed regulations provide no process for the Siletz Tribe and other similarly situated federally-recognized tribes to protect and defend their federally-recognized legal and successorship status. The Siletz Tribe strongly believes that in the case where a petitioning entity claims to be an Indian tribe or band that is already separately federally-recognized or where an existing federally-recognized tribe claims that it is the legal and political successor in interest to the tribe or band in question, through confederation, merger, assimilation or otherwise, the Department must first resolve the question of whether the tribe or band in question already exists as part of a currently recognized tribe before it can entertain that particular acknowledgment petition. If the Department determines that the historical tribe or band in question is indeed part of a currently recognized tribe, the petitioning entity should be prohibited as a matter of law from claiming to be the historical tribe or making any claims to the historic tribe's legal status or history.

To protect this interest, tribes such as the Siletz Tribe must be given notice of any proposed or pending petition that might affect their interests, the right to fully participate and to litigate any federal acknowledgment petition, and the right to appeal any acknowledgement determination adverse to its legal interests (the current regulation on federal acknowledgment hearings at 43 CFR Part 4 would only allow the petitioning entity to petition for a hearing from an adverse acknowledgment petition (adverse to its interests).

In addition, any hearing process must provide for full participation and litigation by existing federally recognized tribes to protect their interests. The intervention regulations just published at 43 C.F.R. § 4.1021 only give a tribe 15 days to appeal and provide notice at the same time of all witnesses, issues, and evidence it plans to introduce

at any hearing. This timeline is not realistic and violates the due process rights of such tribes.

Specific Comments:

The following comments are directed at specific statements in the official notice published in the Federal Register, by page number. The fact that the Siletz Tribe does not respond to every incorrect or inappropriate statement contained in the notice should not be construed as the Tribe's agreement with such statements. The proposed regulation is so flawed, and the misstatements so pervasive, that it is impossible to respond to every misstatement contained in the proposed regulation.

Page 30766-67: The Siletz Tribe does not dispute that third party identification is not necessary to achieve federal recognition. The Siletz Tribe disagrees with the requirement that a petitioner need only provide a brief narrative asserting the petitioning group's existence "at some point during historical times." This does not meet the standard that a petitioner must show continuous political existence during historical times.

As discussed above, the Siletz Tribe strongly disagrees with the Department's assertion that showing existence in 1934 necessarily means – because of the lack of federal interaction with tribes from 1900 to 1934 – that the petitioner has shown existence in 1900, and the Department's assertion that showing existence in 1900 necessarily means the petitioner has existed continuously since historical times. While easing the documentary and administrative burden on the Department is a laudable administrative goal, that goal should not override the legal requirement that a petitioner be required to show continuous separate political existence from the date of first European contact to the present. The documentation or other evidence showing such continuous existence may vary, but proof must still be presented. Otherwise, recognition of new tribes will diminish and dilute the legal status of existing federally recognized tribes.

Page 30767:

The Siletz Tribe strongly disagrees with the criteria for re-opening a petition that has been previously denied. The Siletz Tribe agrees with the principle that if another Indian tribe previously participate in a petition for federal acknowledgment, that tribe should have to consent before a previous petition can be reopened. Even if another affected tribe did not participate in a previous petition for federal acknowledgment – existing Indian tribes often have the same issues with regard to being able to participate in other proceedings – being federally recognized only recently themselves, federal policies that tore the tribe apart and lost much of the tribe's history, lack of financial resources, obstruction by federal agents, etc. – that should not prevent them from raising concerns with regard to an entity's petition to reopen a previous petition. Any time an existing tribe asserts that it will be directly affected by a re-petition for federal acknowledgment, that tribe must be notified and allowed to participate.

In addition, the standards to re-open must be much stricter than a mere preponderance of the evidence that re-petitioning is appropriate. Many tribes would like to revisit old decisions affecting their legal status that were wrongly decided, or decided under incorrect legal criteria, or where the decision-maker was clearly against Indians or Indian status. Those tribes are all restricted, however, by well-defined rules that clearly delineate the extremely narrow circumstances (and the extremely heavy burden of proof that must be met) under which a previous final judgment or order can be reopened. *See United States v. Washington*, 593 F.3d 790 (9th Cir. 2010)(en banc). Petitioners for federal recognition should not get favored treatment in this regard. If the federal government wants to petition Congress for different treatment for all Indian tribes, that would be a different matter. Until that time, however, rejected federal acknowledgment petitioners should not be permitted to game the system and reapply again for federal acknowledgment once a final decision has been rendered. Any contrary rule will have a severe adverse effect on existing tribes whose legal status and successorship may be impacted by recognition of a new petitioning group.

Page 30767 – Process:

Interested parties should also have the right to respond to a comments or rebuttals submitted by the petitioner received during preparation of the proposed finding.

The Siletz Tribe disagrees with the proposed criteria that having land in a State reservation or held in trust "for petitioner" should be a conclusive determination of a right to federal recognition of a petitioner. As the Siletz Tribe laid out with regard to the Coos Tribe above, the attorney and historian for the Coos Tribe in the 1980s found a driveway that had been donated to the United States for the use of "the Coos, Lower Umpqua, Siuslaw and other tribes of Indians" back in the 1930s. There was some discussion about putting the driveway in trust back then (it provided access to an Indian cemetery), but that trust action never eventuated. The Coos Tribe recorded title to the driveway in 1991 and applied to take the land into trust. The Department of Interior concluded in 1994 that the driveway should be formally taken into trust. The driveway was never listed in federal records, and therefore was not included in the Western Oregon Indians Termination Act of 1954, which provided for patenting all remaining trust lands for all the tribes of western Oregon. The land remained off the tax rolls of the local county. But did that driveway belong to the Siletz Tribe, which is the legal and political successor to the historical Coos, Lower Umpqua and Siuslaw Tribes, who were moved to the Siletz Coast Reservation and confederated with the other tribes residing on that reservation, or did it belong to the current recognized Coos Tribe, which originated as a community around Coos Bay in or around 1918? It is the Siletz Tribe's position that if this land belonged to any tribe, it belonged to the Siletz Tribe which is the legal successor to the Coos, Lower Umpqua and Siuslaw Tribes, and that the small community of individual Indians around Coos Bay had no legal claim to this small property 100 miles north of Coos Bay. But the relative claims have never been adjudicated. How does the Department of Interior decide who this property really belongs to?

As this situation illustrates, the mere fact that a "petitioner" may claim ownership to a State reservation or a piece of trust land should have no impact on federal recognition until a full inquiry has taken place – including notice to any affected tribe or a tribe that may also have a claim to land – and such claim has been fully adjudicated. There is a critical difference between a petitioning group and an existing Indian tribe that has the legal claim to ownership of specific property. Otherwise, petitioning groups will try to retroactively bootstrap themselves into federal recognition by casting about for small parcels of trust land that may have fallen through the cracks and never been properly divested of trust status, acquiring a property interest, and claiming mandatory federal acknowledgment.

Page 30767: Any interested or affected tribes should also have a mandatory right to a full hearing in any case in which the Department proposes a positive finding on behalf of a petitioner, where the recognized tribe claims that it will be adversely affected by such positive finding, claims that it is the sole legal successor to the historical tribe in question, or that the petitioner is comprised primarily of persons who are members of or eligible for membership in the existing tribe, or who have voluntarily removed themselves from association with the existing tribe. *See United States v. Oregon*, 29 F.3d 481 (9th Cir. 1994). Under this case, Indians that voluntarily removed themselves from the main tribe, or left the main tribe, have no legal claim to the rights of the historical tribe. This principle must be recognized in any federal acknowledgment decision, and the Department must make a specific finding of successorship in any decision where another tribe has been notified and claims successorship status. A petitioner to claim successorship from a historical tribe must, in addition to the criteria set out in the proposed regulations, have to show specific connection to and continuous political existence from a historical tribe from first sustained European contact.

Page 30768: Hearing process. The Department specifically requested comments on the proposed hearing process. Siletz does not have specific comments on the proposed judges, although Siletz believes it should not be an attorney and should be someone with an Indian law background if at all possible. Retired or senior federal court judges should be considered.

The decision of the OHA judge must be limited to the factual record. Because interested outside parties such as tribes who claim exclusive successorship to the historical tribe that a petitioner may claim a connection to will not have had the opportunity to submit its own full testimony and record, or to cross examine witnesses and evidence submitted by a petitioner, the hearing – which as stated above should be able to be requested by both the petitioner and an interested tribe – should be a full trial if so requested. It would violate the due process rights of tribes who claim sole interest and successorship if the petitioner and/or OFA had exclusive control over which parts of the record to designate for consideration by the OHA judge. An interested tribe should be able to designate record excerpts, and should be able to submit its own additional documents, exhibits, and testimony, including expert testimony. As provided in the new hearing rules at 43 CFR part 4, 14 days is too short of a time after receiving notice of a proposed positive finding

on a petition for federal acknowledgment for an interested tribe to locate experts and all available evidence and to submit a final exhibit and witness list to the Department.

Page 30768: The Siletz Tribe strongly objects to the declared intent of the regulations to limit comments or evidence challenging a proposed finding of acknowledgment to recognized tribes within 25 miles of petitioner's headquarters. The Confederated Siletz Tribe is comprised of bands and tribes of Indians from the entire length of the State of Oregon who were forcibly removed and settled on the Siletz Coast Reservation. The Siletz Tribe is the legal and political successor to all of those tribes and bands. Oregon stretches for 300 miles in a north-south direction. Merely because some small group of people who claim to be Indians and a tribe are more than 25 miles from the Siletz Tribe's headquarters means the Siletz Tribe is not an interested party to a splinter group that is trying to claim the history and status of the Siletz Tribe under the proposed regulation would violate the due process rights of the Siletz Tribe. The regulation as proposed gives the Department full authority to decide if the Siletz Tribe is factually or otherwise implicated by a petition for federal acknowledgment filed by a petitioner further away than 25 miles from Siletz, Oregon. The commentary on this page of the Federal Register says that comments will be limited to tribes within 25 miles, with no exceptions. There should be no physical limit to the right of a recognized tribe that claims legal and successorship status to a tribe that is being claimed by a petitioning group to participate in a federal acknowledgment proceeding, or to submit comments or evidence, or to appeal. If this provision stays in the final regulation, the Siletz Tribe will challenge the regulations.

Page 30768: The Siletz Tribe also objects to the intent of the regulations to allow petitioners to withdraw their petitions after they have received active consideration. All this provision will do is result in repeated and inappropriate expenditure of resources by recognized tribes, who will have to remain vigilant and ramp up every time a petitioner comes back again. And it will encourage petitioners who see they are about to fail to withdraw a petition after it has received full review, in the hope they might sneak it by later.

Siletz also objects to the limiting of time for comments to a proposed finding. It is fine to have a general deadline for comments, but depending on the complexity of the proposed finding and the opportunity that has been given to an interested party up to that point to participate, a longer time for comments may be necessary for a recognized tribe to adequately respond and comment.

Page 30768: Burden of proof. Siletz disagrees with the Department's description of the burden of proof for approving tribal federal recognition of a petitioner. Siletz believes at least a preponderance of the evidence is required, and that this is the definition of a "reasonable likelihood." For example, in the contested APA Samish federal acknowledgment proceeding, ALJ Torbett on August 31, 1995, the judge on page 3 adopted the standard of proof advocated in the Department of Interior's brief at pages 41-49, a preponderance of the evidence for each of the federal acknowledgment criteria, as

enunciated in *Steadman v. SEC*, 450 U.S. 91 (1981). In addition, the ALJ stated: "Also, the quality of evidence presented must show a 'reasonable likelihood of the validity of the facts relating to that criterion.' The Defendants correctly state that the evidentiary standard which must be met by the Petitioners requires minimum quantity and quality measures as to each of the four contested criterion."

The ALJ concluded on page 19 of his decision: "Stated plainly, if the Petitioners have by a simple preponderance of the reliable, probative and material evidence made a case which taken as a whole tends to show the truth of the Petitioners allegations, then they are entitled to recognition. Under this standard, there is no question that there is a preponderance of evidence to support the Petitioners as to each and every element contained in the recognition regulations. Further, there is no question that the quality of the evidence demonstrates that it is reasonable and believable that the Samish have continually existed as an Indian tribe up until this very day. The quality of proof supports the Petitioner as to each element contained in the recognition regulations." A copy of the relevant pages of this Department of Interior brief is attached to the Siletz Tribe's comments for your information.

This is the standard with the Siletz Tribe believes petitioners for federal acknowledgment must meet, as to each criteria in the federal acknowledgment regulations, and what the term "reasonable likelihood" means. Deputy Assistant Secretary Larry Roberts stated at the federal acknowledgment tribal consultation on Tuesday, July 14, 2014, in Portland Oregon, that there was no intent in the revised federal acknowledgment regulations to change the substantive standards for federal acknowledgment or to change the burden of proof. Taking this statement at face value, the quotation above reflects those standards, which were formally advocated by the Department at that time.

The context in which the term "reasonable likelihood" was raised in *Boyde v. California*, 494 U.S. 370, 380 (1990) does not in the opinion of the Siletz Tribe translate to the burden of proof required for federal acknowledgment proceedings. In *Boyde* the issue was whether a criminal case should have been reversed or overturned based on the mere "possibility" that a single juror could have interpreted a jury instruction in an improper unconstitutional manner. A number of competing policies applied to whether a higher or lower standard of proof should be required. The Court in *Boyd* found the "reasonable likelihood" standard to require more than mere speculation but not clear and convincing proof in order to overturn a criminal conviction. The context of this decision cannot be transferred over to federal acknowledgement of tribes. As the preceding discussion showed, the official position of the Department and the standard adopted by the administrative court is that the reasonable likelihood standard in the federal acknowledgment regulations requires a preponderance of the evidence standard as to each and every recognition criteria.

Page 30768: As discussed above, the Siletz Tribe disagrees with the Department's statement that "it is logical to deduce that a tribe in existence when the IRA was passed

was in existence historically." The Siletz Tribe believes that every group that would seek to be recognized as a historical Indian tribe must be required to prove the continuity of that existence from the date of first sustained European contact, whatever form such documentation might take. Siletz agrees that such evidence need not require proof of consistent federal interaction with a group.

Page 30769: This page includes a discussion of the "brief narrative" that a petitioner will be responsible for submitting under the new regulations. It states that this narrative must only show existence as a tribe "at some point in time during the historical period (prior to and including 1900). First, identification at more than one point should be required. Second, this identification cannot be identification to a tribe that is already recognized, or is a theft of the recognized tribe's identity and history.

Page 30679: The Siletz Tribe believes 75 or 80 percent is a more realistic feature to constitute a distinct community. Reference to IRA voting requirements is not relevant. In holding IRA elections, the Department already determined that the group or entity constituted a distinct community – all residents residing on one reservation, or a tribe or tribes who had become one tribe. How many people actually voted in an election to formalize such communities is not reflective of whether such a distinct community exists. The more relevant factor would be that in the 1930s the Department did not allow Indians or tribes that were not located on an existing reservation to vote at all to organize under the IRA, even if they could show they were a distinct community or tribe. The voting percentage under the IRA has no relevance to the existence of a distinct community.

I now turn to comments on the proposed regulations themselves. Siletz has commented on most of the provisions in its comments on the regulation commentary, above, and will not repeat those comments again. The Tribe will merely cite some of the regulatory language as examples to support the points it has made above. The fact that Siletz does not repeat its comments with regard to every regulatory provision does not mean that Siletz agrees that non-cited provisions are acceptable.

Page 30773: Definition of historical. This term should state since the date of first sustained European contact.

Previous federal acknowledgment should be modified to state that it means clear acknowledgment of a government-to-government relationship by federal government officials with authority to establish or confirm such a relationship. Actions taken without authority or for administrative convenience by low level federal employees does not constitute federal acknowledgment.

Page 30773 - § 83.4: The Siletz Tribe has the strongest opposition to this section – Who the Department will not acknowledge, unless . . . . The Department said in the Commentary section that the revised regulations continue the practice of not recognizing splinter groups, Subsection (2) says that the Department will not acknowledge a splinter group, political faction, community or entity of any kind that separates from the main

body of a currently federally recognized Indian tribe "**unless**" that splinter group can clearly demonstrate that it has functioned since 1934 as a politically autonomous community under the regulations, even though some have regarded them as part of or associated in some manner with a federally recognized tribe.

This is the essence of a definition of a splinter group. Under this definition, the group does not have to demonstrate historical existence or existence before 1934, and all it has to do is show that it has operated as an autonomous group even though it voluntarily separated from an existing federally recognized tribe in which the group's "members" are probably enrolled or eligible for membership. Siletz has all kinds of groups like this comprised of small numbers of individuals from the tribes and bands that were settled on the Siletz Coast Reservation and became part of the Confederated Siletz Tribe. Some individuals were either not rounded up originally and moved, or at some point slipped away from the Siletz Reservation and returned to their aboriginal homeland. Under undisputed case law, however, the tribe as an entity moved to the Siletz Reservation and became part of the Siletz confederation. The individuals who left or never moved most often exercised no "political" activity of any kind for multiple decades. They may have slowly formed a "community" for identified purposes, most often well into the 20th century. Yet this definition in the revised regulations would allow such a group to claim and steal the identity of part of the Siletz Tribe.

This is why the Siletz Tribe said earlier in these comments that there should be a mandatory determination of successorship and legal status as part of any federal recognition proceeding, so existing tribes can protect their identity and heritage. This definition of what splinter group can organize as a tribe should be deleted in its entirety.

Page 30774, § 83.4(b): Siletz does not believe petitioners should be able to re-petition final decisions against federal acknowledgment. Assistant Secretary Roberts stated during the public hearing in Portland that the revised rules are not intended to alter the substantive standards for recognition, and were not intended to alter the burden of proof. Federal rules extremely narrowly allow reopening of a previous final decision, and only for extraordinary circumstances. FRCP 60(b)(6). That standard should apply here also – a petitioner that has been previously denied should be required to go to federal court and satisfy current federal standards to reopen a previous final decision. Siletz also disagrees with the language of subsection (b)(2)(ii) that only the OFA and the petitioner have the right to participate in a proceeding to determine whether a former petitioner should be allowed to reopen their petition. Interested and affected tribes must also be allowed to participate in such a proceeding.

Page 30774, §83.10(a)(1): As discussed above, the Siletz Tribe strongly disagrees that reasonable likelihood means less than a preponderance of the evidence, which is more likely than not. Recognition as a tribe is a serious act, and the burden of proof is on the petitioner. This definition seriously waters down the standard of proof from the standard that other tribes such as the Samish Indian Nation had to meet in contested proceedings. The fact that a petitioner does not have to prove that it is more likely than not that they

are entitled to recognition, just more than a mere possibility. The attached material also accurately describes the quality and quality of evidence necessary to sustain a finding of federal acknowledgment, as opposed to the reduced criteria set out at §83.10(2).

Page 30775, Subsection (7) should be the context of the history, geography and social organization of the historical tribe from which a petitioner claims continuous political existence, not the status just of the petitioner. This subsection as drafted just reinforces that splinter groups can be recognized as independent tribes under the revised regulations.

Page 30775, §83.11(a): As discussed above, Siletz disagrees with the regulation's proposed intent to only require a petitioner to demonstrate historical existence at one point in time.

Subsection (b): Siletz believes that a petitioner should also be required under this subsection to prove that it is not and could not be part of an existing federally recognized tribe; otherwise the Department is specifically sanctioning splinter groups under this regulations as separate Indian tribes. By also only requiring proof of existence since 1934 without "substantial interruption," with substantial interruption interpreted to mean up to 20 years or even more if petitioner's circumstances warrant, the regulation really only requires a continuous existence as an internally cohesive community from 1954 or perhaps even later.

As one example of how this revised regulation authorizes tribal splinter groups to be recognized as a separate tribe, subsection (b)(1) (ix) allows a petitioner to merely show that children from an identified geographic area went to Indian boarding schools without any requirement to show those children weren't associated at that time with a recognized Indian tribe.

Subsection (c) should require evidence of political influence or authority separate from a recognized Indian tribe. Under (c)(1)(vii), the petitioner should be required to show a continuous line of political authority separate from any recognized tribe that claims legal and political successorship to the same tribe that petitioner is claiming a connection to.

Page 30776, § 83.11(c)(3)(ii): As per the discussion above, the Department must determine whether the land in question was held for a recognized tribe or members of that recognized tribe. Allowing a petitioner to claim a political existence because land was held by the United States for "collective ancestors of the petitioner" who happened to be members of a federally recognized tribe should not constitute existence of political existence or authority, since that political existence or authority belonged to a recognized tribe rather than the petitioner. Petitioners should not be allowed to steal the existence or history of a recognized tribe.

Page 30776, Subsection (e)(2(v): This criteria allows a petitioner to claim descendancy from another historical tribe that is a presently recognized tribe. This criteria should be amended to state specifically that the criteria cannot be satisfied by claiming present

members or ancestors of present members who are claimed by an existing federally recognized tribe.

Page 30776, Subsection (g): This provision, addressing previous congressional termination, should be addressed in greater detail. For example, the 1954 Western Oregon Indians Termination Act listed 60 specific tribes and bands and all Indians in Oregon west of the Cascade Mountains. This broad language would theoretically ban any group in western Oregon from petitioning for federal recognition. There is no process for groups to respond to the federal government's position on termination, or for interested parties to weigh in on this issue, but the regulations should do so.

Page 30777, §83.22(b)(3): What is the remedy if OFA does not notify a tribe that claims a historical or present relationship with a petitioner or that might otherwise have a potential interest in the acknowledgment determination? What if such a tribe does not find out until positive proposed findings are published? Will the Department repeat the entire federal acknowledgment process so as to give an improperly omitted tribe a full chance at commenting and a hearing?

Pages 30777-78, §83.26: Interested tribes should receive notice of proposed findings and any tentative determinations or deficiencies, and an opportunity to comment on same or supplemental information, the same as the petitioner.

Page 30778: Interested and affected tribes should have the same right to comment on submissions by any other party, and to file responses and additional evidence and documentation, as the petitioner.

Page 30778, §83.28: Interested tribes should also have the right to comment on and provide additional evidence concerning petitioner's alleged previous federal acknowledgment.

Page 30780, § 83.38: As stated in the public session in Portland, interested or affected tribes have no option under the regulations to challenge a proposed positive recognition determination or to request a full hearing and trial on any such request. Dissatisfied interested tribes are left only with the option of an APA appeal, with its high standards of deference and its arbitrary and capricious/substantial evidence standards of review. It is quite likely that an interested tribe will be left with no avenues of effective appeal to fully challenge a federal acknowledgment decision with which the tribe disagrees.

This concludes the Siletz Tribe's comments on the proposed revisions to the Federal Acknowledgment Regulations. The Tribe would be glad to respond to any comments or concerns regarding these comments.

Sincerely,

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MARGARET GREENE, et al. Appellants,	)	
v.	)	Docket No. Indian 93-1
BRUCE BABBITT, et al., Defendants.	)	

DEFENDANTS' POST-HEARING MEMORANDUM

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was inevitable but that such assimilation did not necessarily mean the abandonment of the tribal community. The court concluded, however:

> When assimilation is complete, those of the group purporting to be the tribe cannot claim tribal rights. While it might be said that the result is unjust if the tribe has suffered from federal or state discrimination, it is required by the communal nature of tribal rights. To warrant special treatment, tribes must survive as distinct communities. [Citations omitted.]
>
> ...
>
> But the district court specifically found that the appellants had not functioned since treaty times as "continuous separate, distinct and cohesive Indian cultural or political communit(ies)." [Citations omitted.]
>
> After close scrutiny, we conclude that the evidence supports this finding of fact. Although the appellants now have constitutions and formal governments, the governments have not controlled the lives of the members. Nor have the appellants clearly established the continuous informal cultural influence they concede is required.
>
> The appellants' members are descended from treaty tribes, but they have intermarried with non-Indians and many are of mixed blood. That may be true of some members of tribes whose treaty status has been established. But unlike those persons, those who comprise the groups of appellants have not settled in distinctively Indian residential areas.
>
> We cannot say, then, that the finding of insufficient political and cultural cohesion is clearly erroneous.

Washington III, at 1373-74.

Thus we take it as established that the Petitioner has the burden of proof and is not entitled to any presumptions

based on the claims of its members to have descended from a treaty tribe.

As to the standard of proof, the Administrative Procedures Act (APA) in its section on hearings, burden of proof, and evidence, inter alia, provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d).

The Supreme Court interpreted this provision in Steadman v. SEC, 450 U.S. 91 (1981). The Court determined that the phrase "in accordance with . . . substantial evidence" requires a decision based on a certain "minimum quantity" of evidence. Steadman, 98 (emphases in original). Although the language of the APA failed to enunciate the required standard of proof, the Court found express Congressional intent in the legislative history. Steadman, 100-01 (citing H.R. Rep. No. 1980, 79th Cong., 2d Sess. 37 (1946)). The Court held that the APA section quoted above adopted a preponderance-of-the-evidence standard for administrative proceedings. Steadman, 102.

Courts recognize, however, that the preponderance standard also encompasses quality-of-evidence standards. In

Steadman, the Supreme Court noted that the applicable APA section mandates certain quantity and quality standards; the section directs such minimum quality standards by requiring the "exclusion of 'irrelevant, immaterial, or unduly repetitive evidence'" and by requiring "'reliable' and 'probative' evidence." 450 U.S. at 98 n.17. The Interior Board of Indian Appeals (IBIA) also adopted this view: "The weight and credibility of the evidence are matters properly considered by an [ALJ] in the first instance. [The ALJ's] findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed." Estate of Mary Chippewa Jackson, 7 IBIA 224, 231 (1979) (citations omitted) (Emphases added).

Addressing this quality standard, the Supreme Court previously confirmed that:

> [T]he preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.

In re Winship, 397 U.S. 358, 367-68 (1970) (citation omitted). The Ninth Circuit recently stressed that preponderance of the evidence means "not mere quantity of evidence but evidence of a sufficient quality to convince the district court's mind of the truth of the proposition

asserted." United States v. Frushon, 10 F.3d 663, 666 (9th Cir. 1993), cert. denied, 114 S. Ct. 2175 (1994) (citation omitted). Another court stated that: "Preponderance of the evidence still requires proof sufficient to persuade the finder of fact that the proposition is more likely true than not true." Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D. D.C.), aff'd, 920 F.2d 967 (D.C. Cir. 1990) (Emphasis in original). The Supreme Court recently emphasized that, to satisfy the preponderance standard, "the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." Concrete Pipe & Prod. v. Construction Laborers Pension Trust for S. Cal., 113 S. Ct. 2264, 2279 (1993).

Acknowledging these quantity- and quality-of-evidence requirements, various courts have defined the preponderance standard. One court stated that the quantum of evidence must be more convincing than the evidence offered in opposition. Hale v. DOT, 772 F.2d 882, 885 (Fed. Cir. 1985). Another court stated that:

> "Preponderance of the evidence" means the greater weight of evidence. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if it

> cannot be said upon which side it weighs heavier, then plaintiff has not met his or her burden of proof.

Smith v. United States, 557 F. Supp. 42, 51 (W.D. Ark. 1982), aff'd, 726 F.2d 428 (8th Cir. 1984). In a charge to the jury, another court explained that:

> "Preponderance of the evidence" does not mean the greater amount of testimony as opposed to the lesser. Rather it refers to the quality of the evidence--its persuasiveness to [the factfinder]. . . . Thus, to "establish by a preponderance of the evidence" simply means to persuade [the factfinder] that something is more likely so than not so. If that evidence as to a particular element is evenly balanced, the party having the burden of proof has not proved that element by a preponderance . . . and [the factfinder] must find for the other side on that issue.

Gilbane Bldg. Co. v. Nemours Found., Civ. A. No. 83-58-WKS, 1985 WL 9493, at *2 (D. Del. Jan. 25, 1985) (appendix). See also American Gilsonite Co., 111 IBLA 1, 33 (1989); Thunderbird Oil Corp., 91 IBLA 185, 201 (1986), aff'd sub nom. Planet Corp. v. Hodel, CV No. 86-679 HB (D. N.M. May 6, 1987).

In Universe Tankships, Inc. v. United States, plaintiff sought to recover damages to its vessel, claiming that it struck certain rocks in the Delaware River because of the government's negligence in preparing the channel depth statements upon which plaintiff relied. 388 F. Supp. 276, 277, 285 (E.D. Pa. 1974), aff'd, 528 F.2d 73 (3d Cir. 1975). Plaintiff offered a "substantial" quantity of evidence in

support of its theory. Id. at 277; see also id. at 280-84, 286. The government offered "very little evidence" and attacked the "quality of plaintiff's evidence." Id. at 286; see also id. at 277. The court stated:

> If in applying the preponderance of the evidence test to the facts before us we needed only weigh the evidence, there would be little doubt that plaintiff would be entitled to judgment. . . . [But] it is with the quality of the evidence that we also must be concerned.

Id. at 286 (Emphasis added). The court concluded that it was "not convinced by a preponderance of the evidence" and that plaintiff failed to meet its burden. Id. at 288.

In Smith, the district court determined that plaintiff failed to establish by a preponderance of the evidence that plaintiff contracted Guillain-Barre Syndrome (GBS) or that the governmentally administered swine flu vaccine plaintiff received caused her condition. 557 F. Supp. at 52. The court went through a lengthy fact-finding analysis, discussing testimony and records asserting plaintiff's medical history, the symptoms or criteria in diagnosing GBS, and the dates around the alleged onset of plaintiff's condition. Id. at 43-47. The court discussed possible consistencies between plaintiff's condition and GBS shown by the evidence, but determined that plaintiff's history of medical problems, the timing of alleged onset, and other inconsistencies with GBS weighed at least evenly with finding

GBS and a causal connection with the vaccine. Id. at 47-51. Therefore, the court held that plaintiff failed to carry her burden by a preponderance of the evidence. Id. at 52.

In Parker Land & Cattle Co. v. United States, plaintiff sought to recover damages for plaintiff's cattle infected with brucellosis, a disease which causes cows to abort their fetuses. 796 F. Supp. 477, 481 (D. Wyo. 1992). Bison and elk are potential sources of the disease. Id. Although the court found evidence that federal managers were negligent in allowing infected wildlife to roam free, the court held that plaintiff failed to establish by a preponderance that federally managed elk or bison infected plaintiff's cattle. Id. at 483-84, 488.

In Estate of George Neconie, the IBIA affirmed a judge's ruling that the proponent failed to prove by a preponderance that the decedent was her natural father. 16 IBIA 120, 121-22 (1988). Proponent produced a birth certificate, school records, and testimony indicating that the decedent was her father. Id. at 121. Decedent's sole surviving heir disputed this evidence, and the judge determined that the proponent failed to meet her burden. Id.

Likewise, in Estate of Joseph Dupoint, the IBIA affirmed a judge's determination that appellant failed to establish by a preponderance that the decedent was her grandfather. 15

IBIA 59, 61 (1986). Appellant offered as proof a birth certificate, various affidavits, her grandmother's will, and prior testimony. Id. at 60. The judge found this evidence insufficient and unpersuasive. Id. at 60-61.

In Kellus v. United States, a postal employee argued that, had he not been previously removed from employment, training, experience and competition would have assured his promotion. 13 Cl. Ct. 538, 545 (1987). The Claims Court rejected the argument, stating that "unrefuted testimony need not be accepted at face value where it is speculative or intrinsically nonpersuasive." Id. (citation omitted).

The regulations at issue, both the old and new versions, establish a preponderance of the evidence standard as well. The old regulations for federal acknowledgement of certain American Indian tribes required evidence that the group "has been identified from historical times until present on a substantially continuous basis, as 'American Indian,' or 'aboriginal.'" 25 C.F.R. § 83.7(a) (1993) (Emphasis added); see also id. § 83.7(b) ("Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian . . . ."") (Emphasis added). The regulations also required a certain quality of evidence. Id. § 83.7 (establishing mandatory criteria required in the petition for tribal existence to be

acknowledged federally) (see generally this subsection); id. § 83.7(a)(1)-(7) (evidence of "repeated" dealings between the entity and others or other qualified historical evidence); id. § 83.9(a) (allowing the Assistant Secretary to consider all evidence--by the petitioner, by other parties, or by the Assistant Secretary's own staff--in determining whether to acknowledge the petitioner); id. § 83.10(c) (requiring the Secretary to request reconsideration if "significant new evidence" is proffered, if the Assistant Secretary relied upon evidence deemed "unreliable" or "of little probative value," or if evidence adduced appears "inadequate or incomplete in some material respect") (Emphases added).

The new regulations retain this standard of review. Although the preamble to the new regulations suggests that the regulations do not adopt the preponderance standard, see 59 Fed. Reg. 9280, 9280 (Feb. 25, 1994), the surrounding language clearly displays public confusion regarding levels of evidence. The preamble stated that commentators requesting the preponderance standard incorrectly assumed "that the acknowledgement process presently requires proof beyond a reasonable doubt." Id. The preamble seemingly eschewed the preponderance standard based on the belief that the standard "focused on weighing" only the quantity of evidence. See id. The preamble replied that the

preponderance standard "is not appropriate where the primary question is usually whether the level of evidence is high enough, even in the absence of negative evidence, to demonstrate meeting a criterion." Id. Thus, the preamble recognized the need for certain minimum quantity and quality standards of evidence.

The new regulations therefore adopted a standard of proof requiring evidence to show a "reasonable likelihood of the validity of the facts relating to that criterion." Id. at 9295 (codified at 25 C.F.R. § 83.6(d) (1994)). This standard, as well as the preamble's recognition of an evidentiary standard which requires minimum quantity and quality measures and the regulation's continued requirement of the petition's meeting all mandatory criteria, clearly embraces the preponderance standard defined by courts at all levels.

the Assistant Secretary - Indian Affairs that she decline to determine that the Petitioner is entitled to be acknowledged as an Indian tribe.

Respectfully submitted,

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